

1 Honorable Marsha J. Pechman  
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5 UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE  
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8 BOILERMAKERS NATIONAL ANNUITY  
9 TRUST, On Behalf of Itself and All Others  
10 Similarly Situated,

11 Plaintiff,  
12  
13 v.  
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15 WAMU MORTGAGE PASS-THROUGH  
16 CERTIFICATES, SERIES 2006-ARI, *et al.*,  
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19 Defendants.  
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22 NEW ORLEANS EMPLOYEES'  
23 RETIREMENT SYSTEM and MARTA/ATU  
24 LOCAL 732 EMPLOYEES RETIREMENT  
25 PLAN, Individually and on Behalf of All Others  
Similarly Situated,  
26

Plaintiff,  
v.  
WASHINGTON MUTUAL BANK, *et al.*,  
Defendants.

No. C09-0037 (MJP)

BOILERMAKERS NATIONAL  
ANNUITY TRUST, NEW ORLEANS  
EMPLOYEES' RETIREMENT SYSTEM  
AND MARTS/ATU LOCAL 73  
EMPLOYEES RETIREMETN PLAN'S  
OPPOSITION TO THE MOTION OF  
THE POLICEMEN'S ANNUITY AND  
BENEFIT FUND FOR THE CITY OF  
CHICAGO FOR LEAD PLAINTIFF AND  
APPROVAL OF SELECTION OF LEAD  
COUNSEL AND MOTION FOR LEAVE  
TO CONDUCT DISCOVERY;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

NOTE ON MOTION CALENDAR:

APRIL 3, 2009 (LEAD PLAINTIFF  
MOTION)

APRIL 17, 2008 (MOTION TO  
CONDUCT DISCOVERY)

No. C09-00134 (RSM)

OPPOSITION TO MOTION TO APPOINT LEAD PLAINTIFF AND  
MOTION FOR LEAVE TO CONDUCT DISCOVERY  
Case No. C09-0037 (MJP)/C09-00134 (RSM)

## I. INTRODUCTION

The Boilermakers National Annuity Trust (the “Boilermakers Trust”), New Orleans Employees’ Retirement System (“New Orleans”) and MARTA/ATU Local 732 Employees Retirement Plan (“MARTA/ATU”) (collectively referred to herein as the “Movants”) respectfully submit this memorandum of law in opposition to the competing motion for appointment of lead plaintiff and approval of selection of lead counsel filed by Policemen’s Annuity and Pension Fund of the City of Chicago (“Policemen’s Fund”).

As explained more fully below, the Policemen's Fund's motion raises the question of whether or not they properly valued their investment in the WaMu Mortgage Pass-Through Certificates at issue. As a result, Movants respectfully request leave to take limited discovery of the Policemen's Fund in order to verify their financial interest in the relief being sought herein.

## II. ARGUMENT

**A. The Policemen's Fund's Financial Interest in the Relief Sought by the Class Appears to be Overstated**

Providing insufficient information can be a bar to appointment to lead plaintiff in analogous circumstances. *See In re Genstar-TV Guide Int'l, Inc. Sec. Litig.*, 209 F.R.D. 447, 452 & n.8 (C.D. Cal. 2002) (rejecting lead plaintiff movants who provide insufficient information about their identities, sophistication and resources); *Piven v. Sykes Enters.*, 137 F. Supp. 2d 1295, 1305 (M.D. Fla. 2000) (rejecting lead plaintiff motion of institution that failed to provide information regarding its location, line of business, resources and experience); *Switzenbaum v. Orbital Sciences Corp.*, 187 F.R.D. 246, 250 (E.D. Va. 1999) (“having failed to volunteer anything more than conclusory assertions about its competence to manage this case, the Group has put its adequacy of representation in doubt”); *Norman v. Arcs Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y. 1976) (“[o]ne who will not comply wholeheartedly and fully with the discovery requirements of modern federal practice, is not to be regarded by the Court as one to whom the important fiduciary obligation of acting as a class representative should be entrusted”). Given

OPPOSITION TO MOTION TO APPOINT LEAD PLAINTIFF;  
MOTION FOR LEAVE TO CONDUCT DISCOVERY - 1  
Case No. C09-0037 (MJP)/ C09-00134 (RSM)



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1 the need for clarification concerning the measure of the Policemen's Fund's losses and the  
 2 Policemen's Fund's failure to provide basic information, limited discovery concerning the  
 3 Policemen's Fund's adequacy and typicality is necessary.<sup>1</sup>

4       Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C.  
 5 §78u-4, there exists a presumption that the most adequate lead plaintiff is the party which, in  
 6 part, "has the largest financial interest in the relief sought by the class." 15 U.S.C.  
 7 §78u-4(a)(iii)(B)(iii)(I)(bb). However, pursuant to 15 U.S.C. §78u-4(a)(iii)(B)(iv), the court may  
 8 permit "discovery relating to whether a member or members of the purported plaintiff class is the  
 9 most adequate plaintiff" when a competing movant "demonstrates a reasonable basis for a  
 10 finding that the most adequate plaintiff is incapable of adequately representing the class."  
 11 *Herrgott v. United States Dist. Court for the N. Dist. of Cal.*, 306 F.3d 726, 730 (9th Cir. 2002)  
 12 (reversing lead plaintiff appointment that used improper standard; holding that district court may  
 13 need to hold an evidentiary hearing in making a renewed motion of typicality and adequacy).  
 14 "Uncertainty" or "unanswered questions" about a potential lead plaintiff's ability to properly  
 15 represent the class are sufficient to trigger the PSLRA's lead plaintiff discovery provision. *See*  
 16 *Fischler v. Amsouth Bancorp.*, No. 96-15676-CIV-T-17A, 1997 U.S. Dist. LEXIS 2875, at \*11  
 17 (M.D. Fla. Feb 6, 1997) (permitting lead plaintiff movant to conduct discovery of competing  
 18 movant in light of uncertainty and unanswered questions surrounding movant's interest in the  
 19 case).

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21       <sup>1</sup> Furthermore, the Policemen's Fund's Certification Pursuant to Federal Securities Laws  
 22 (annexed to the Shingler Decl. as Ex. B) omits the Policemen's Fund's appointment and  
 23 prosecution, serving as Lead Plaintiff, in the action *Policemen's Annuity and Benefit Fund of*  
*24 Chicago v. Seibel Systems, Inc., et al.*, No. CV-04-983-CRB (N.D. Cal.). While this matter was  
 25 dismissed by the District Court in 2005, Policemen's Fund appealed the decision to the Ninth  
 26 Circuit Court of Appeals, which then issued its decision affirming dismissal of the complaint  
 against Defendants in January 2008. *See Policemen's Annuity and Benefit Fund of Chicago v.*  
*Seibel Systems, Inc., et al.*, No. 06-15129 (9th Cir. entered Jan. 17, 2008). As such, the  
 Policemen's Fund was in fact serving as a representative party on behalf of a class in an action  
 arising under the Securities Laws and/or Exchange Act within the last three years, which was  
 omitted from the signed executed Certification. *See* Shingler Decl. Ex. B.

1       Although a wide-ranging analysis concerning an applicant's background may not be  
 2 warranted, the failure to permit discovery and promptly address obvious potential inadequacies  
 3 can result in adverse consequences to the Class being represented. *Cf. In re Sonus Networks Inc.*  
 4 *Sec. Litig.*, 229 F.R.D. 339 (D. Mass. 2005) (decertifying class after lead plaintiff withdrew or  
 5 were found inadequate.)

6       In the instant matter, there exists a discrepancy in the methodology by which Movants  
 7 and the Policemen's Fund accounted for their respective investments in WaMu Certificates. *Cf.*  
 8 Declaration of Steve Berman in Support ("Berman Decl."), Exhibits ("Ex.") C, D, E with  
 9 Declaration of Art Shingler in Support (Shingler Decl.), Ex. B. As is evident from the  
 10 Certifications of Securities Class Action submitted by the Movants, they priced their Certificate  
 11 purchases at an approximate initial par value of \$1.00 per Certificate,<sup>2</sup> resulting in an aggregate  
 12 investment for the Movants of approximately \$4.5 million on purchases of 10.5 million  
 13 Certificates. *See* Movants Memorandum in Support ("Movants Memo") at 3; *see also*, Berman  
 14 Decl., Exs. C, D, E.

15       In contrast, the Counsel for the Policemen's Fund valued the WaMu Certificates using a  
 16 par value of \$100.00 per Certificate, claiming to have invested over \$34.0 million in purchasing  
 17 349,893 million WaMu Certificates. However, the Prospectus Supplements pursuant to which  
 18 the Certificates were issued price the Certificates at \$1.00 per certificate. (*See* accompanying  
 19 Declaration of Christopher Lometti ("Lometti Decl."), Ex. A). Thus, there is a serious question  
 20 as to the Policemen's Fund's true out-of-pocket expenditures, and in turn, their financial interest  
 21 in the relief sought herein. Under these circumstances, Movants respectfully request permission

25       <sup>2</sup> A par value of \$1.00 does not take into account the discount or premium at which the  
 26 proposed lead plaintiff's actually purchased the various Certificates, which is referred to as the  
 Coupon.

1 to conduct limited discovery in order to verify the Policemen's Fund's financial interest in the  
 2 relief sought. *See, e.g., Fischler*, 1997 U.S. Dist. LEXIS 2875.<sup>3</sup>

3 **III. CONCLUSION**

4 For the forgoing reasons, the Policemen's Fund's motion for appointment of lead plaintiff  
 5 and approval of selection of lead counsel should be denied. Instead, it is respectfully submitted  
 6 that the Movants should be permitted to conduct discovery in order to determine the true extent  
 7 of the Policemen's Fund's financial interest in the relief being sought herein.

8 DATED this 30th day of March, 2009.

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 25 <sup>3</sup> Moreover, Counsel for the Movants has requested documentation from Counsel for the  
 26 Policemen's Fund which could be used to verify the calculations set forth in the Policemen's  
 Fund's competing motion and supporting papers. To date, Counsel for the Policemen's Fund has  
 failed to provide any documentation to Movants' Counsel. *See* Lometti Decl. ¶ 2.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1 Executed this 30th day of March, 2009, in Seattle, Washington.

2 HAGENS BERMAN SOBOL SHAPIRO LLP

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4 By: /s/ Steve W. Berman  
Steve W. Berman

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